NKM HOLDINGS SDN. BHD.

v.

BANK BURUH (M)

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C 69 OF 1985]
13 MAY 1987

CIVIL PROCEDURE: *Injunction - Application by defendant to inter alia dissolve injunction granted to plaintiff on an ex parte application - Injunction granted to restrain defendant from appointing Receiver and/or Manager on plaintiff company or entering plaintiff's premises or otherwise intermeddling or dealing in its management of affairs until final determination of trial or until further order - Whether non-disclosure or suppression of facts by plaintiff - Balance of convenience.*

This was an application by the defendant to *inter alia* dissolve an injunction granted on an *ex parte* application made by the plaintiff. Under the *ex parte* order, the injunction restrained the defendant, its directors, servants or agents from appointing a Receiver and/or Manager on the plaintiff company or entering the plaintiffs premises until further order. According to the plaintiffs affidavit, the defendant had offered the plaintiff two separate credit facilities, the latter amounting to RM800,000 for the purpose of business finance and which was to be secured by a debenture by way of Floating Charge. The plaintiff alleged that no debenture or guarantee was created.

The defendant later issued a notice of demand through its solicitors claiming a sum of RM595,965.09 which was alleged to be outstanding and due from the plaintiff. A writ of summons was then filed by the defendant and the plaintiff later filed its defence. A meeting between both parties was held in an attempt to arrive at an amicable settlement of the earlier suit. At the meeting the defendant stated that it would be placing a Receiver pursuant to the debenture unless a sum of RM200,000 was paid towards the earlier suit.

The defendant in its affidavit in support of the present application denied that there were second credit facilities except the original facilities as restructured at the request of the plaintiff and alleged *inter alia* that both parties had agreed at the meeting on a draft consent order agreed upon. The defendant further alleged that the plaintiff in breach of the consent order obtained the *ex parte* injunction.

Held:

[1] There was no non-disclosure or suppression of facts when the plaintiff made the *ex parte* application. When the affidavit in support of the *ex parte* application was affirmed, the plaintiff did not have a copy of the minutes or a copy of consent order. The fact that there was a meeting between the parties was mentioned in the plaintiff's affidavit.

[2] From the conflicting affidavits, it is clear that there is a serious question to be tried. On the question of balance of convenience, if Receivers were appointed, the board of directors of the plaintiff company would cease to function. The plaintiff company would no longer be managed by itself. If the injunction was not granted, the plaintiff would suffer loss which cannot be adequately compensated by money. On the other hand, if the injunction continued, the defendant would not suffer any loss which could not be compensated. The balance of convenience is in favour of continuing the injunction.

[Application dismissed with costs.]

For the plaintiff - M. S. Murthi; M/s. Murthi & Partners
For the defendant - KL Rekhraj; M/s. KL Rekhraj

JUDGMENT

Zakaria Yatim J:

This is an application by the defendant for an order of the Court to dissolve an injunction granted on 7 January 1985 on an *ex parte* application made by the plaintiff. The defendant also asks the Court to make an order that an enquiry be held on damages payable by the plaintiff to the defendant occasioned by the injunction. The defendant further asks that the costs of this application be paid by the plaintiff to the defendant in any event.

Under the *ex parte* order dated 7 January 1985, the defendant by itself, its directors, servants or agents be restrained and an injunction was granted restraining the defendant from appointing a receiver and/or manager on the plaintiff company or entering the plaintiff's premises or otherwise intermeddling or dealing in its management of affairs until the final determination of the trial of the action or until further order.

At the commencement of this application, Counsel for the defendant, Mr. Rekhraj raised a preliminary objection. He submitted that the writ was dated 7 January 1985. The *ex parte* application was also dated 7 January 1985. The affidavit in support of the *ex parte* application was affirmed on 5 January 1985 that is, two days before the writ was issued and before the *ex parte* application was filed. According to him this was a very serious flaw and accordingly the *ex parte* order could not stand. After hearing the arguments of both parties, I overruled the objection as the matter was a mere irregularity which could be cured by the plaintiff filing a fresh affidavit. See my decision in *Rozli b. Abdul Rahman v. Chan Yoke Thong & Sons Realty Sdn. Bhd. & Others* (KL Originating Summons No. C112 of 1985 (Unreported)).

I shall now deal with the application to dissolve the injunction.

The *ex parte* application made by the plaintiff is supported by an affidavit of the managing director of the plaintiff company dated 30 November 1985. In the affidavit he averred as follows:

The plaintiff was the customer of the defendant. On 1 September 1978, the defendant in a letter offered the plaintiff credit facilities in the nature and sum of: (i) pre-shipment finance of RM400,000 and (ii) bill purchase facility RM400,000 as working capital. The facilities were to be secured by a debenture and upon the terms and conditions of the letter of offer. The plaintiff accepted the defendant's offer and on 23 September 1978 passed a circular resolution to this effect. In May or June 1979, the credit facilities granted by the defendant to the plaintiff was fully repaid by the plaintiff by bills presented to the bank. On 23 April 1979, the defendant by a letter offered the plaintiff fresh credit facilities in the nature and sum of pre-shipment finance RM800,000 for the purpose of business finance. The said credit facilities were to be secured by a debenture by way of floating charge for RM800,000 and upon the terms and conditions in the said letter of offer. The plaintiff accepted the defendant's offer and on 23 September 1978 passed a circular resolution to this effect. The resolution stated that the plaintiff had to execute a fresh debenture to secure the facilities. Pursuant to the credit facilities of 23 April 1979, no debenture or guarantee was created. The defendant, by its letter dated 16 August 1979 agreed to release the funds provided in the second credit facilities on an *ad hoc* basis and in accordance with the terms and conditions as specified in the letter of offer dated 23 April 1979. On 9 March 1982 the defendant through its solicitors sent a notice of demand claiming a sum of RM595,965.09 which was alleged to be outstanding and due from the plaintiff to the defendant. On 3 July 1982 the defendant filed a writ of

summons vide Kuala Lumpur High Court Civil Suit No. C 1252 of 1982 ("the earlier suit") claiming against the plaintiff a sum of RM595,965.09. On 14 April 1983, the plaintiff filed its defence stating, *inter alia*:

(i) that the said sum demanded was not secured under the offer of loan;

(ii) that the second credit facilities were to be secured by a fresh debenture from the plaintiff and personal guarantees of its directors; and

(iii) the plaintiff did not in fact obtain the said debenture and guarantee as envisaged under the letter of offer dated 23 April.

The defendant filed a notice of intention to proceed in the earlier suit on 4 October 1984. On 3 January 1985 both parties held a meeting in an attempt to arrive at an amicable settlement of the earlier suit. At the meeting the defendant stated that it would be placing a receiver pursuant to the debenture dated 10 October 1978 unless a sum of RM200,000 was paid towards the earlier suit on or before 7 January 1985. The defendant intended to appoint a receiver on the plaintiff company whereupon the plaintiff would be unfairly, wrongfully and unlawfully be subjected to loss and damages.

The defendant, in its affidavit in support of the application averred as follows:

The defendant's affidavit stated that the facilities granted were for a total sum of RM800,00, which was apportioned as RM400,000 for pre-shipment finance and the balance of RM400,000 for bill purchase facilities. At no time were the facilities repaid. Instead, the facilities were restructured at the request of the plaintiff. The defendant alleged that the plaintiff, in obtaining the *ex parte* injunction misrepresented and/or deliberately suppressed material facts from the Court by exhibiting a circular resolution 9/79 with the word "fresh", when the prepared resolution produced to the defendant was without the word "fresh". The defendant denied that there were second credit facilities except the original facilities as restructured at the request of the plaintiff. The defendant confirmed the meeting between the parties with regard to the Kuala Lumpur High Court Civil Suit No. C 1252 of 1982. The defendant alleged that both parties had agreed on a draft consent order in respect of the said civil suit. The defendant further alleged that the plaintiff, in breach of the consent order, obtained the *ex parte* injunction. According to the defendant the plaintiff had not raised any serious question to be tried. The defendant averred that it was in a position to pay adequate damages if as a result of the appointment of the receiver the plaintiff suffered any loss. The defendant alleged that the plaintiff's undertaking was of no financial value.

Mr. Rekhraj submitted that there was suppression of facts in that the plaintiff failed to disclose the consent order agreed upon. The affidavit of the defendant exhibited the minutes of the meeting between the parties and para. 6 of the minutes stated as follows:

> 6. After a lengthy discussion it was agreed that:
>
> (a) NKM Holdings Sdn. Bhd. the 1st defendant and Mr. N. Krishnamoorthy a guarantor and as 3rd defendant will:
>
> (i) pay a sum of RM200,000 on or before 12.00 noon on 7 January 1985 and consent to an unconditional Judgment in the total sum of RM783,030.74 as at 31 December 1984, and further continuing interest at the rate of 13% per annum.
>
> (ii) a further sum of RM200,000 to be paid by the same parties on or before 15 February 1985.
>
> (iii) the final balance to be paid on or before 30 June 1985.

(b) In consideration of the above the Bank will restrain itself from appointing a Receiver and Manager but shall be at liberty to proceed to support the Winding-Up Petition fixed for hearing on 10 January 1985, with a specific understanding that in the event of the said petition being struck off or withdrawn, the Bank shall not substitute itself as a creditor.

(c) It is further agreed that Mr. Moorthy and his solicitors will prepare a memorandum of understanding on the terms towards recording a Consent Judgment and meet the officials of the Bank on 4 January 1985.

The plaintiff in para. 9 of its affidavit in reply affirmed on 19 March 1985, denied that it agreed to the terms stated in para. 6 quoted above. According to the plaintiff the minutes were not an accurate record of the proceedings that transpired at the meeting. Mr. Murthi, Counsel for the plaintiff, in his submission told the Court that the affidavit in support of the *ex parte* application was affirmed on 5 January 1985 at 12.00 noon. The meeting was held on 3 January 1985 and it ended at 4.00 p.m.

In my opinion there was no non-disclosure or suppression of facts, when the plaintiff made the *ex parte* application. The minutes of the meeting held on 3 January 1985 was dated 9 January 1985. The draft consent order was sent by the defendant to the plaintiffs solicitors with a covering letter dated 5 January 1985. The letter was received on 7 January 1985. When the affidavit in support of the *ex parte* application was affirmed, the plaintiff did not have a copy of the minutes or a copy of the consent order. The fact that there was a meeting between the parties was mentioned in the plaintiff's affidavit.

From the conflicting affidavits filed by the plaintiff and the defendant, it is clear that there is a serious question to be tried. The plaintiff alleged that the debenture was not discharged in respect of the second credit facilities. According to Mr. Murthi, when the second credit facilities were approved the facilities were not secured by debenture.

On the question of balance of convenience, it is a fact that the defendant is threatening to appoint receivers to manage the plaintiff company. If receivers were appointed the board of directors would cease to function. The plaintiff company would no longer be managed by itself. If the injunction was not granted the plaintiff would suffer loss which cannot be adequately compensated by money. On the other hand,if the injunction continued the defendant would not suffer any loss which could not be compensated. Furthermore the defendant would continue to function as a normal bank. The injunction does not stop the Bank from doing business. In my opinion, the balance of convenience is in favour of continuing the injunction.

For the reasons stated above, the defendant's application to dissolve the *ex parte* injunction granted on 7 January 1985 is dismissed with costs.

Also found at [1987] 1 CLJ 599